BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RALPH V. FERGUSON
(Claimant)

PRECEDENT
DISABILITY DECISION
No. P-D-328
Case No. D-75-263

S.S.A. No. !

Office of Appeals No. S-D-28208

The claimant appealed from the decision of the Administrative Law Judge which held that the claimant was ineligible for the basic disability and additional benefits for hospitalization which had been paid because the claimant had received workmen's compensation benefits for the same period. The decision also held that the claimant was liable for the repayment of $499 in basic benefits and potentially liable for the repayment of $24 in additional benefits for hospitalization if those benefits are not repaid by the hospital.

STATEMENT OF FACTS

The claimant last worked for a Chico, California trailer sales company as a laborer on July 3, 1974. Under postmarked date of September 4, 1974, the claimant filed with the Department a first claim for disability benefits. The claimant gave the first day he was too sick to work as July 3, 1974 and described his condition as awful headaches. The claimant's orthopedic surgeon, who commenced treating the claimant on August 7, 1974, gave a diagnosis of "Possible herniated cervical disc" with a myelogram scheduled for September 9, 1974, an anterior cervical fusion scheduled for September 10, 1974, and a prognosis date of January 1, 1975. Both the claimant and the surgeon answered "no" to the questions on the claim as to whether the disability was caused by work and whether any claims or reports had been made about the disability as a workmen's compensation claim.

The Department processed the claim with an effective date of July 31, 1974, seven days prior to the date

the claimant was first seen by the doctor. After a waiting period week, the Department paid disability benefits to the claimant at the rate of $40 a week for the period beginning August 7, 1974 through November 2, 1974, when the claimant's maximum award of $499 was exhausted. The Department also paid $24 additional benefits for hospitalization directly to the hospital. The Department issued the final check to the claimant on November 6, 1974.

On or about November 8, 1974, the claimant filed an application for adjudication of claim with the Workmen's Compensation Appeals Board. The application stated that an injury at work on May 24, 1974 had resulted in disability from that date except for sporadic work until July 3, 1974, with disability continuing thereafter without compensation from the employer or medical treatment. On the application the claimant stated "yes" that he had received unemployment insurance or unemployment compensation disability benefits.

In the normal course of events, the Workmen's Compensation Appeals Board would send notice to the Department of the filing of the application so that it could check to see whether the claimant had filed any unemployment or disability claims for which the Department should file a lien claim. For reasons unknown to the representative of the Department at the hearing before the Administrative Law Judge, the process was delayed on the claimant's application and the lien for basic and hospital benefits was not filed under California Labor Code sections 4903(f) and 4903(b) until February 24, 1975. In the meantime, a stipulated award had been filed by the parties on February 18, 1975, approved by the Workmen's Compensation Referee, and mailed to the parties of record on February 20, 1975. The award provided for (1) temporary disability at the rate of $56.69 a week beginning July 4, 1974 and continuing; (2) reimbursement for self-procured medical treatment in an amount to be adjusted by the parties; (3) reimbursement for $106.25 medical-legal costs to applicant's attorney; and (4) continued necessary treatment. Payments as specified were made to the claimant and he continued to be disabled and in receipt of $56.69 weekly at least up to the hearing herein on August 14, 1975.

The Department inquired about its lien in July 1975 and was informed of the earlier stipulated award. The Department then issued its notice of determination denying benefits under sections 2629 and 2804 of the code and its notice of overpayment to the claimant for $499 in basic benefits and the notice of overpayment to the hospital for $24.

The question before us for consideration is whether the Department may seek to recover directly from the claimant what it failed to recover from filing its lien with the Workmen's Compensation Appeals Board.

REASONS FOR DECISION

Beginning with Disability Decision No. 517, this Board held that lump sum payments under a compromise and release agreement approved by the Industrial Accident Commission must be considered in reducing or denying disability benefits under section 2629 of the Unemployment Insurance Code. In so doing, we followed the decisions of the California Supreme Court in Bryant v. Industrial Accident Commission (1951), 37 Cal. 2d 215, 231 P. 2d 32; Aetna Life Insurance Company v. Industrial Accident Commission (1952), 38 Cal. 2d 599, 241 P. 2d 530; and Garcia v. Industrial Accident Commission (1953), 41 Cal. 2d 689, 263 P. 2d 8. Subsequently, effective September 11, 1957, section 2629 of the code was amended to apply only to temporary disability indemnity. At the same time section 2629 of the code was amended, sections 2735.5 and 2741 were added to the code to provide as follows:

"2735.5. No claim of overpayment shall be based upon the disallowance by the Industrial Accident Commission under Section 4904 of the Labor Code of a claim of lien filed under subdivision (f) of Section 4903 of said code, or the allowance of such lien for less than the amount claimed, or upon the approval by the said commission of a compromise and release agreement providing for the allowance of such lien in an amount less than the claim."

"2741. Any claim of lien filed with the Industrial Accident Commission under the provisions of subdivision (f) of Section 4903 of the Labor Code shall be fully discharged and

satisfied by payment of the amount of such lien allowed by the commission under the provisions of Section 4904 of said code or the amount specified in any compromise and release agreement filed and approved by the commission pursuant to Sections 5000 through 5004 of said cod ."

Effective September 15, 1961, sections 2735.5 and 2741 were amended to delete the reference to subdivision (f) of section 4903. A minor revision was made in section 2735.5 in 1963 to refer specifically to section 4903 of the "Labor Code" instead of "said code." In 1967, sections 2735.5 and 2741 were amended to substitute "Workmen's Compensation Appeals Board" for "Industrial Accident Commission" and "appeals board" for "Commission" so that, as amended, these sections now read as follows:

"2735.5. No claim of overpayment shall be based upon the disallowance by the Workmen's Compensation Appeals Board of a claim of lien filed under Section 4903 of the Labor Code, or the allowance of such lien for less than the amount claimed, or upon the approval of said appeals board to a compromise and release agreement providing for the allowance of such lien in an amount less than the claim."

"2741. Any claim of lien filed with the Workmen's Compensation Appeals Board under the provisions of Section 4903 of the Labor Code shall be fully discharged and satisfied by payment of the amount of such lien allowed by the commission under the provisions of Section 4904 of said code or the amount specified in any compromise and release agreement filed and approved by the appeals board pursuant to Sections 5000 through 5004 of said code."

Labor Code section 4903(f) provides for the allowance of a lien against workmen's compensation for unemployment compensation disability benefits. Labor Code section 4903(f) provides for the allowance of a lien for medical and hospital expenses.

When the 1957 changes with respect to workmen's compensation were made in the Unemployment Insurance Code, the California Legislature also changed Labor Code sections 4903 and 4904. The following proviso was added to subdivision (f) of section 4903 (unchanged in present law):

> ". . . provided, however, that any lien under this subdivision shall be allowed and paid as provided in Section 4904."

Section 4904, which provides for liens upon written notice to the insurer or to the employer if uninsured, allowance, and payment of liens, was amended by the addition of the following language (with minor changes, still contained in present law):

> ". . . In determining the amount of lien to be allowed for unemployment compensation disability benefits under subdivision (f) of Section 4903 the commission shall allow such lien in the amount of benefits which it finds were paid for the same day or days of disability for which an award of compensation for temporary disability indemnity is made. In the case of agreements for the compromise and release of a disputed claim for compensation, the applicant and defendant may propose to the commission, as part of the compromise and release agreement, an amount out of the settlement to be paid to any lien claimant claiming under subdivision (f) of Section 4903. The determination of the commission, subject to petition for reconsideration and to the right of judicial review, as to the amount of lien allowed under subdivision (f) of Section 4903, whether in connection with an award of compensation or the approval of a compromise and release agreement, shall be binding on the lien claimant, the applicant, and the defendant, insofar as the right to benefits paid under the Unemployment Insurance Code for which the lien was claimed. . . ." (Emphasis added)

Section 5003 of the Labor Code was also amended in 1957 to require that the number of days and the amount of

temporary disability indemnity which should be allowed must be set forth in every compromise and release agreement.

The purpose and effect of these 1957 statutory changes were discussed by the California Supreme Court in California-Western States Life Insurance Company v. Industrial Accident Commission (1963), 59 Cal. 2d 257, 28 Cal. Rptr. 872, 379 P. 2d 328. In that case the petitioning insurance company had paid unemployment disability benefits in the total amount of $1,105 to Mrs. Baird after she had first claimed and been denied workmen's compensation. Thereafter, Mrs. Baird entered into a compromise and release agreement with her employer and his workmen's compensation insurance carriers settling her claim for $8,500 with $200 to go to petitioner under the formula developed in Davis v. Blaser (1958), 24 Cal. Comp. Cases 100. The Commission (now Worker's Compensation Appeals Board and worker's compensation; see November 5, 1974 amendment to section 21 of Article XX of the California Constitution and section 3200 of the Labor Code) allowed the petitioner's lien claim in the sum of $250.

The California Supreme Court held that the petitioner was bound by that allowance. In so holding, the court pointed out that the 1957 statutory changes basically changed its prior rulings in Bryant and Aetna, supra, by specifying recovery from temporary disability indemnity, and by legislative scheme establishing two distinct, equally valid, methods for the disposition of compensation claims, either (1) by direct decision by the Commission (Appeals Board), or (2) by its approval of a settlement by the parties. Therefore, while the petitioner was entitled to participate in the specific process of settlement of the lien claim, it was not entitled to findings on any "daily duplication" of benefits where the issue was one of overall adequacy and general fairness of the settlement to all parties and lien claimants. The court stated, in part:

> "This case appears to be precisely the type of situation that the 1957 amendment to section 4904 was intended to cover. Petitioner had accepted premium payments for the purpose of insuring Mrs. Baird, the employee, against a disability which was not covered by workmen's compensation. Indeed, the commission originally denied coverage here. Mrs. Baird might have elected not to litigate her

workmen's compensation claim and in that event petitioner would not have recouped at all. If she did proceed and an award were rendered in which disability and compensation payments were duplicated, then petitioner could accordingly recoup. In the instant case, however, the issue of whe ner Mrs. Baird's disability suffered an industrial injury was a doubtful one; both she and the workmen's compensation carriers deemed it more advantageous to compromise.

"The Legislature has encouraged compromises. (Lab. Code, § 5000). Now to permit a third party, a lien claimant who could assert no right to recoupment at all in the absence of a workmen's compensation proceeding, to interfere with the settlement and force the rendition of findings would be to nullify the procedure for compromise.

"Requisite to the resolution of the overlapping of the statutory coverage of protection of the worker by means of unemployment and disability compensation is a clear and fast means of adjustment. A submission to the commission, for its final determination, of a proposed basis for settlement is highly desirable, and the Legislature had manifested its intent to implement it. To destroy such expedition of settlement by the imposition of debilitating technicality finds justification neither in the legislative purpose nor the social imperatives."

In accordance with the changes in the law in 1957 and the views expressed on these changes in the California-Western States Life Insurance Company v. Industrial Accident Commission, supra, we hold in the present case that there is but one means of recovery of the disability benefits paid for the same period as the claimant received workmen's compensation and that means was through the lien procedure before the Workmen's Compensation Appeals Board. The Department filed its lien late before that board and has received no satisfaction. Nevertheless, there lies its remedy, if any now exists. The Department may not seek restitution directly from the claimant for any amounts it failed to

recover through the lien procedure before the forum provided under the legislative scheme as a "clear and fast means of adjustment" for "final determination," the Workmen's Compensation Appeals Board.

We reach the same conclusion with respect to the additional benefits for hospitalization. Although sections 2735.5 and 2741 of the Unemployment Insurance Code as added in 1957 originally referred to subdivision (f) of section 4903 of the Labor Code, that subdivision reference was eliminated effective September 15, 1961, so the sections referred only to section 4903 of the Labor Code. This amendment permitted, apparently, the filing of any appropriate lien, including one for hospitalization where furnished under subdivision (b) of section 4903 of the Labor Code or subdivision (f) of that section for unemployment and disability benefits. In any event, in Department of Employment v. Industrial Accident Commission (1964), 227 Cal. App. 2d 532, 38 Cal. Rptr. 739, the California District Court of Appeal held that additional benefits for hospitalization are properly recoverable by lien proceedings before the Industrial Accident Commission where they are duplicative of workmen's compensation. In that case, the Department paid such benefits under an assignment from the claimant directly to a hospital where the claimant was confined for a disabling condition for which he claimed workmen's compensation. The Department filed a claim of lien under section 4903(b) of the Labor Code before the Industrial Accident Commission, but the claim was denied. The court remanded the case to the commission to determine the reasonableness of the amount claimed and to allow the amount so found as a lien against the sum to be paid as workmen's compensation to the claimant.

While a distinction was made between the allowance of a lien for unemployment disability benefits and additional benefits for hospitalization in Fireman's Fund Company v. Industrial Accident Commission (1959), 170 Cal. App. 2d 412, 339 P. 2d 225, that decision was prior to the 1961 amendment, as were Disability Decisions Nos. 635 and 641. We distinguish also Disability Decision No. 556, cited by the Department in support of its position, and our other decisions which considered somewhat similar situations arising prior to the 1957 and 1961 amendments to the Unemployment Insurance Code and the Labor Code.

Because the overpaid benefits can be recovered only through the lien procedure before the Worker's Compensation Appeals Board, the provisions of section 2735 of the Unemployment Insurance Code with respect to overpayments in general have no application to the facts of the present case.

DECISION

The decision of the Administrative Law Judge is modified. The claimant was ineligible for basic disability and additional benefits for hospitalization under sections 2629 and 2804 of the Unemployment Insurance Code. The notice of overpayment is set aside. Any recovery of the basic and additional benefits which were overpaid must be through the lien procedure before the Worker's Compensation Appeals Board.

Sacramento, California, May 20, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

CARL A. BRITSCHGI

HARRY K. GRAFE

DISSENTING OPINION

We dissent.

The majority opinion holds that the Department is barred from assessing an overpayment against one who drew disability benefits in a case where neither the claimant nor anyone else gave the Department notice that the claimant believed the cause of his disability was work-connected, or notice that the claimant had filed a claim for workers' compensation, in time for the Department to file a workers' compensation lien before claimant received a workers' compensation award. We disagree that such a bar should be imposed upon the Department where, as here, there is no indication that the Department was lax in filing its lien, and on the other hand, the claimant failed to put the Department on notice at any time that he believed the injury which caused his disability was work-connected and that he had filed a workers' compensation claim.

The court decisions and statutes cited by our colleagues are inapposite to the facts of this case. We have no quarrel with the proposition that once the Department has filed its workers' compensation lien and an award is made, the Department thereafter is foreclosed from interfering with the settlement if the Department is disappointed with the amount of the award (California-Western States Life Insurance Company v. Industrial Accident Commission (1963), 59 Cal. 2d 257). But we submit that the facts in the instant matter are far different from those in the California-Western Insurance Company case or in any other authority relied on by our colleagues.

Here, when the claimant filed his first claim for disability insurance benefits, he answered "No" to the question, "Was the disability caused by your work?" The claimant signed that claim form on August 23, 1974. On the basis of his physician's certificate that the claimant was disabled, he was awarded $40 per week with a maximum of $499. The claimant was paid disability insurance benefits from August 7, 1974 through November 2, 1974, when his maximum entitlement was exhausted.

On November 8, 1974, the claimant filed a workers' compensation claim, asserting that he was injured while working on May 24, 1974, and that as a result of said injury the claimant became disabled except for sporadic work until July 3, 1974, after which he was unable to work. The record in the case before us does not pinpoint with finality the date upon which the claimant formed the belief his disabling injury was work-connected. Sworn testimony at the hearing discloses that the claimant had formed such belief prior to the date he signed his first claim for disability insurance benefits. His attorney argues on appeal that such testimony was erroneous, and the belief was not formed until shortly after that initial claim for disability insurance benefits was submitted.

Whichever version is correct, it is undisputed that the claimant had the belief during the period he was drawing disability insurance benefits that his disability was produced by an on-the-job injury. Yet, at no time while he was filing continued claims for disability insurance benefits and receiving said benefits did the claimant advise the Department of the probable source of his disabling injury. Or did the claimant so advise the Department at the time he filed his workers' compensation claim, which occurred almost contemporaneously with his receipt of his final disability insurance benefits check.

For reasons known only to the staff of the State Division of Industrial Accidents - Workers' Compensation Appeals Board, notice of the claimant's workers' compensation claim dated November 8, 1974 was not given the Department with any degree of promptitude. In fact, the Department did not receive such notice until an unspecified date in February 1975. Thereafter, the Department prepared and filed its workers' compensation lien on February 24, 1975, sending copies to claimant, his attorney, claimant's employer and its workers' compensation carrier. Time passed and the Department, having had no further notice, wrote the Workers' Compensation Appeals Board on July 25, 1975, asking the status of claimant's case. It was in response to that inquiry that the Workers' Compensation Appeals Board advised the Department that an award had been made on February 18, 1975 pursuant to a stipulation between the claimant and the company by which he was employed when the disabling injury occurred. That award antedated by six days the Department's lien.

We cannot help but criticize the abject inattention demonstrated by the Workers' Compensation Appeals Board staff in this case. Not only was there a failure for over three months to give the Department notice of the workers' compensation claim, but, after receipt of the Department's lien utter silence reigned, broken only by the Department's pointed inquiry. Such soporific condition on the part of that agency is inexcusable.

We recite the detailed facts of this case to illustrate the ease with which the Department's right to interpose a lien can be absolutely defeated. The claimant must have been aware that the question of the cause of his disabling injury was material to the Department, and thus should have disclosed such information once he formed the opinion that it was work-connected. The decision by the majority in this case today can only tend to encourage others to similarly fail to disclose such material facts, and if their circumstances duplicate those of the claimant here, they will do so with impunity.

The Administrative Law Judge is correct in her statement that, had the Legislature intended that the Department could not assess an overpayment against a claimant under the facts of this case, our lawmakers certainly could and would have made a specific prohibition. Yet, there is nothing in the statutes even hinting at such a prohibition. Nor have our colleagues cited a judicial ruling directly or analogously in point with the instant facts in support of their position. In short, the majority decision herein is unduly and unnecessarily punitive against the Department, and is another example where those who are less than direct and forthright are rewarded, but the innocent are punished. With that kind of reasoning we cannot agree.

CARL A. BRITSCHGI

HARRY K. GRAFE